

**Health Care & Retirement Corporation of America  
(HCR) d/b/a Heartland of Clarksburg and International  
Brotherhood of Teamsters, Chauffeurs, Warehousemen and  
Helpers of America, Local 789. Case 6-CA-14865**

April 23, 1982

**DECISION AND ORDER**

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

Upon a charge filed on September 4, 1981, by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 789, herein called the Union, and duly served on Health Care & Retirement Corporation of America (HCR) d/b/a Heartland of Clarksburg, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 6, issued a complaint on September 30, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 19, 1981, following a Board election in Case 6-RC-8725, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;<sup>1</sup> and that, commencing on or about August 18, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 12, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On January 25, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 2, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Sum-

mary Judgment should not be granted. Respondent thereafter filed a memorandum in opposition to the Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

**Ruling on the Motion for Summary Judgment**

In its answer to the complaint and memorandum in opposition to the Motion for Summary Judgment, Respondent admits that the Union has requested and that it has refused to bargain, but contends that the Union's certification is invalid because the Board improperly overruled its objections in the underlying representation proceeding. The General Counsel argues that Respondent is attempting to relitigate issues decided by the Board in the underlying representation case and that all material issues have been previously considered. We agree with the General Counsel.

Our review of the record herein, including the record in Case 6-RC-8725, establishes that pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on May 8, 1980. The tally was 38 for and 30 against the Union, with no void or challenged ballots. Respondent timely filed objections to the conduct affecting the results of the election, alleging essentially that (1) the Union unlawfully agreed to waive initiation fees for all employees who supported the Union and unlawfully gave the impression that only members or supporters of the Union would not have to pay initiation fees and (2) prounion employees made threats of discharge to fellow employees. On June 30, 1980, after investigation, the Acting Regional Director for Region 6 issued a Report on Objection, Order Directing Hearing on Objection, and Notice of Hearing, in which he recommended that Objection 2 relating to threats be overruled and ordered a hearing be held on the issues raised by Objection 1. On July 11, 1980, Respondent filed exceptions to the Acting Regional Director's report, and, on September 24, 1980, the Board adopted the Acting Regional Director's findings and recommendations, and ordered that a hearing be held. A hearing was held on October 28 and 29, 1980, and on January 29, 1981, the Hearing Officer issued her Report on Objections to Election, in which she recommended that the Board overrule Respondent's Objection 1 and that the Union be certified. On February 11, 1981, Respondent filed exceptions to the Hearing Officer's Report on Objections to Election. On June 19,

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 6-RC-8725, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

1981, the Board issued its Decision and Certification of Representative,<sup>2</sup> in which it adopted the Hearing Officer's findings and recommendations and certified the Union.

Subsequently, by letter dated July 20, 1981, the Union requested that Respondent meet for purposes of collective bargaining. Since August 18, 1981, Respondent has refused to bargain with the Union on the grounds that the Union was improperly certified.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>3</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF RESPONDENT

Respondent, an Ohio corporation, is engaged in the operation of a health care facility, more particularly a nursing home, in Clarksburg, West Virginia. During the 12-month period preceding the issuance of the complaint, a representative period, Respondent, in the course and conduct of its operations, received gross revenues in excess of \$100,000, and purchased and received at its Clarksburg facility goods and materials valued in excess of \$50,000 from other enterprises located within the State of West Virginia, each of which enterprises had received its said goods and materials directly from points outside the State of West Virginia.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and a health care institution within the meaning of Sec-

tion 2(14) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

### II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 789, is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES

#### A. *The Representation Proceeding*

##### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time service and maintenance employees employed by the Respondent at its Clarksburg, West Virginia nursing home, including nursing assistants, orderlies, cooks, relief cooks, dietary assistants, ward clerks, housekeepers, laundry employees and maintenance employees; excluding all other employees, including registered nurses, licensed practical nurses, technical employees, social workers, activity coordinators, office clerical employees, medical record employees, confidential employees, managerial employees and guards, professional employees and supervisors as defined in the Act.

##### 2. The certification

On May 8, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 6, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on June 19, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

#### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about July 20, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 18, 1981, and continuing at all times thereafter to date, Respondent has

<sup>2</sup> Not reported in volumes of NLRB decisions.

<sup>3</sup> See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 18, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### CONCLUSIONS OF LAW

1. Health Care & Retirement Corporation of America (HCR) d/b/a Heartland of Clarksburg is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and a

health care institution within the meaning of Section 2(14) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 789, is labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time service and maintenance employees employed by Respondent at its Clarksburg, West Virginia nursing home, including nursing assistants, orderlies, cooks, relief cooks, dietary assistants, ward clerks, housekeepers, laundry employees and maintenance employees; excluding all other employees, including registered nurses, licensed practical nurses, technical employees, social workers, activity coordinators, office clerical employees, medical record employees, confidential employees, managerial employees and guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 19, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 18, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Health Care & Retirement Corporation of America (HCR) d/b/a Heartland of Clarksburg, Clarksburg, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 789, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time service and maintenance employees employed by the Respondent at its Clarksburg, West Virginia nursing home, including nursing assistants, orderlies, cooks, relief cooks, dietary assistants, ward clerks, housekeepers, laundry employees and maintenance employees; excluding all other employees, including registered nurses, licensed practical nurses, technical employees, social workers, activity coordinators, office clerical employees, medical record employees, confidential employees, managerial employees and guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility in Clarksburg, West Virginia, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Re-

spondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 789, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time service and maintenance employees employed by the Employer at its Clarksburg, West Virginia nursing home, including nursing assistants, orderlies, cooks, relief cooks, dietary assistants, ward clerks, housekeepers, laundry employees and maintenance employees; excluding all other employees, including registered nurses, licensed practical nurses, technical employees, social workers, activity coordinators, office clerical employees, medical record employees, confidential employees, managerial employees and guards, professional employees and supervisors as defined in the Act.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA (HCR) D/B/A  
HEARTLAND OF CLARKSBURG

<sup>4</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."